SUPREME COURT, U.S.
FILED
FEB 20 2004
OFFICE OF THE CLERK

No. 03-1037

IN THE

Supreme Court of the United States

SHARRON E. ANGLE, *ET AL.*, MEMBERS OF THE NEVADA STATE ASSEMBLY AND THE NEVADA STATE SENATE,*
Petitioners,

v.

KENNY GUINN, GOVERNOR OF THE STATE OF NEVADA, *ET AL.*,*
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Nevada

BRIEF IN OPPOSITION

BRENDA J. ERDOES
SCOTT G. WASSERMAN
WILLIAM L. KEANE
LEGISLATIVE COUNSEL BUREAU
NEVADA STATE LEGISLATURE
401 S. Carson Street
Carson City, NV 89701
(775) 684-6620

NED MILTENBERG
Counsel of Record
ROBERT S. PECK
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
1050 31st Street, N.W.
Washington, D.C. 20007
(202) 944-2840

ERWIN CHEMERINSKY
THE LAW SCHOOL
UNIVERSITY OF SOUTHERN CALIFORNIA
699 Exposition Blvd.
Los Angeles, CA 90089
(213) 740-2539

Counsel for all Respondents Except Hon. Kenny Guinn, Governor, and Hon. Lorraine T. Hunt, Lieutenant Governor, State of Nevada

* *Full list of parties on page ii*

QUESTIONS PRESENTED

The questions presented by this case are:

1. Whether this Court should exercise jurisdiction over a moot controversy, one in which Petitioners sought to have any tax increase for educational purposes approved by a two-thirds supermajority vote in both houses of the Nevada Legislature, in which they obtained that sought-after result, and in which they have not met their burden of showing how the facts of this case fall within the well-established exceptions to the mootness doctrine?

2. Whether this Court should exercise jurisdiction over a case in which there is no conflict among the States or the U.S. Courts of Appeals, and where the Petitioners failed to timely raise—and the court below did not entertain or rule on—the question of whether an ostensible misinterpretation of a State Constitution by a State Supreme Court violates the Fourteenth Amendment's Due Process Clause?

3. Whether this Court should exercise jurisdiction to consider an inherently political and non-justiciable question under the Article IV's Republican Guarantee Clause when that question was not presented to or passed on by the court below?

4. Whether this Court should exercise jurisdiction to consider whether "voter dilution" claims are viable under the Fourteenth Amendment's Equal Protection and Due Process Clauses when those claims were not raised in or decided on by the court below and in the absence of any evidence that Petitioners are members of a distinct and identifiable political group or that they were or will likely be the victims of intentional discrimination?

LIST OF PARTIES

PETITIONERS: Members of the Nevada State Assembly: Hon. Sharron E. Angle, Hon. Walter Andonov, Hon. Bob Beers, Hon. David F. Brown, Hon. John C. Carpenter, Hon. Chad Christensen, Hon. Peter J. Goicoechea, Hon. Thomas J. Grady, Hon. Donald G. Gustavson, Hon. Lynn C. Hettrick, Hon. Ronald L. Knecht, Hon. R. Garn Mabey, Jr., Hon. John W. Marvel, Hon. Roderick R. Sherer, Hon. Valerie E. Weber; Members of the Nevada State Senate: Hon. Mark E. Amodei, Hon. Barbara K. Cegavske, Hon. Warren B. Hardy II, Hon. Mike McGinness, Hon. Dennis Nolan, Hon. Ann O'Connell, Hon. Dean A. Rhoads, Hon. Sandra J. Tiffany, and Hon. Maurice E. Washington.

RESPONDENTS: The Governor of the State of Nevada, Hon. Kenny Guinn; The Lieutenant Governor of the State of Nevada, Hon. Lorraine T. Hunt; The Legislature of the State of Nevada; The Speaker of the Nevada Assembly, Hon. Richard D. Perkins; Members of the Nevada State Assembly: Hon. Bernie Anderson, Hon. Morse Arberry, Jr., Hon. Kelvin D. Atkinson, Hon. Barbara E. Buckley, Hon. Vonne S. Chowning, Hon. Jerry D. Claborn, Hon. Tom Collins, Hon. Marcus Conklin, Hon. Jason Geddes, Hon. Dawn Gibbons, Hon. Chris Giunchigliani, Hon. David Goldwater, Hon. Josh Griffin, Hon. Joe Hardy, Hon. William C. Horne, Hon. Ellen M. Koivisto, Hon. Sheila Leslie, Hon. Mark A. Manendo, Hon. Kathy McClain, Hon. Bob McCleary, Hon. Harry Mortenson, Hon. John Oceguera, Hon. Genie Ohrenschall, Hon. David R. Parks, Hon. Peggy Price, Hon. Wendell P. Williams; Members of the Nevada State Senate: Hon. Lorraine T. Hunt, The President of the Senate; Hon. Terry Care, Hon. Maggie Carlton, Hon. Bob Coffin, Hon. Bernice Mathews, Hon. Joseph M. Neal, Jr., Hon. William J. Raggio, Hon. Raymond D. Rawson, Hon. Michael Schneider, Hon. Raymond C. Shaffer, Hon. Dina Titus, Hon. Randolph Townsend, Hon. Valerie Wiener.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

PERTINENT CONSTITUTIONAL PROVISIONS 1

BRIEF FOR RESPONDENTS IN OPPOSITION 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 9

I. THIS CASE IS MOOT 11

A. The "Voluntary Cessation" Exception Does Not Apply 14

B. The "Capable-of-Repetition, Yet-Evading-Review" Exception Does Not Save this Case from Mootness 17

II. THIS COURT LACKS JURISDICTION OVER THIS CASE BECAUSE THE QUESTIONS PRESENTED WERE NOT RAISED OR DECIDED BELOW 20

III. PETITIONERS' CLAIMS LACK MERIT AND RAISE A NON-JUSTICIABLE POLITICAL QUESTION 24

A. Petitioners' Republican Guarantee Clause Claim Presents a Non-Justiciable Political Question 25

B. Petitioners' Due Process Claims Are Hollow 28

C. Petitioners' Voter Dilution Claims Are Unsupported by Anything in the Record of this Case 29

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Adams v. Robertson, 520 U.S. 83 (1997) 21
Allee v. Medrano, 416 U.S. 802 (1974) 16
American Legion Post No. 7 v. City of Durham, 239 F.3d 601 (4th Cir. 2001) 15
Anderson v. Celebrezze, 460 U.S. 780 (1983) 19
Arizona v. Evans, 514 U.S. 1 (1995) 25
Associated General Contractors of Conn., Inc. v. City of New Haven, 41 F.3d 62 (2d Cir. 1994) 15
Baker v. Carr, 369 U.S. 186 (1962) 26
Bell v. Wolfish, 441 U.S. 520 (1979) 17, 22
Berry v. Davis, 242 U.S. 468 (1917) 16
Binegar v. Eighth Judicial Dist., 915 P.2d 889 (Nev. 1996) 19
Board of County Comm'rs, Clark County v. White, 729 P.2d 1347 (Nev. 1986) 12
Board of License Com'rs of Town of Tiverton v. Pastore, 469 U.S. 238 (1985) 17
Board of Pub. Util. Comm'rs v. Compania General De Tabacos De Filipinas, 249 U.S. 425 (1919) 16
Bowyer v. Taack, 817 P.2d 1176 (Nev. 1991) 23
Boyne v. State ex rel. Dickerson, 390 P.2d 225 (Nev. 1964) 19
Bryan v. Austin, 354 U.S. 933 (1957) 12, 15
Burke v. Barnes, 479 U.S. 361 (1987) 15
Calder v. Bull, 3 U.S. (Dall.) 386 (1798) 25
Calderon v. Moore, 518 U.S. 149 (1996) 13
California v. San Pablo & T.R. Co., 149 U.S. 308 (1893) 12
Campbell v. Louisiana, 523 U.S. 392 (1998) 21
Church of Scientology of Calif. v. Zolin, 506 U.S. 9 (2002) 12
Citizens for Resp. Gov't v. Davidson, 236 F.3d 1174 (10th Cir. 2000) 15
City of Erie v. Pap's A.M., 529 U.S. 277 (2000) 12
City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 16
City of Mesquite v. Aladdin's Castle, 455 U.S. 283 (1982) 16
City of Reno v. Second Jud. Dist., 78 P.2d 101 (Nev. 1998) 11
Coleman v. Miller, 307 U.S. 433 (1937) 26, 30
Commissioner v. Estate of Bosch, 387 U.S. 456 (1967) 25
Conway v. Searles, 954 F. Supp. 756 (D. Vt. 1997) 28
County of L.A. v. Davis, 440 U.S. 625 (1979) 15

D.H.L. Assoc. v. O'Gorman, 199 F.3d 50 (1st Cir. 1999).....15
Davis v. Bandemer, 478 U.S. 109 (1986) 29, 30
Davis v. United States, 512 U.S. 452 (1994).....22
DeFunis v. Odegaard, 416 U.S. 312 (1974) 15
Deptartment of Treasury v. Galioto, 477 U.S. 556 (1986) 15, 16
Diffenderfer v. Central Baptist Church of Miami, Inc., 404 U.S. 412 (1972) 16
Dunn v. Blumstein, 405 U.S. 330 (1972).....19
Engle v. Isaac, 456 U.S. 107 (1982).....24
Ex rel Shelor, 111 P. 291 (Nev. 1910).....23
Exxon Corp. v. Dept. of Revenue of Wis., 447 U.S. 207 (1980) 25
Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896) 25
Federation of Adver. Indus. Rep's, Inc., v. City of Chicago, 326 F.3d 924 (7th Cir. 2003).....14, 17
Field v. Clark, 143 U.S. 649 (1892) 28
Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000) 14
Fusari v. Steinberg, 419 U.S. 379 (1975) 16
Granberry v. Greer, 481 U.S. 129 (1987) 24
Greenberg v. Bolger, 497 F. Supp. 756 (E.D.N.Y. 1980) 28
Guinn v. Legislature of State of Nevada, 71 P.3d 1269, *reh'g denied and opinion clarified*, 76 P.3d 22 (Nev. 2003) ....*passim*
Hall v. Beals, 396 U.S. 45 (1969).....17
Heath v. Alabama, 474 U.S. 82 (1985) 21
Heller v. Doe, 509 U.S. 312 (1993).....15
Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937).....25
Illinois v. Gates, 462 U.S. 213 (1983).....21
Johnson v. Frankel, 520 U.S. 911 (1997).....25
Jones v. Temmer, 57 F.3d 921 (10th Cir. 1995).....17
Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637 (6th Cir. 1997).....15, 17
Knetsch v. United States, 364 U.S. 361 (1960) 22
Kremens v. Bartley, 431 U.S. 119 (1977) 15, 16
Lewis v. Continental Bank Corp., 494 U.S. 472 (1990) 16
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).....28, 29
Luther v. Borden, 48 U.S. (7 How.) 1 (1849) 26
Maher v. Roe, 432 U.S. 464 (1977) 17
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).....6
Massachusetts v. Oakes, 491 U.S. 576 (1989).....16

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940) 21
Michigan v. Long, 463 U.S. 1032 (1983) 13, 26
Mills v. Green, 159 U.S. 651 (1895) 13
Minnesota v. National Tea Co., 309 U.S. 551 (1940) 26
Moore v. Ogilvie, 394 U.S. 814 (1969) 13, 19
Morse v. Repub. Party of Virginia, 517 U.S. 186 (1996) 19
Mosley v. Hairston, 920 F.2d 409 (6th Cir. 1990) 15
National Black Police Ass'n v. Dist. of Columbia, 108 F.3d 346 (D.C. Cir. 1997) 15, 17
Native Village of Noatak v. Blatchford, 38 F.3d 1505 (9th Cir. 1994) 15
Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) 23
Nesmith v. Sheldon, 48 U.S. 812 (1849) 25
Nevada Power Co. v. Haggerty, 989 P.2d 870 (Nev. 1999) 22
New Orleans Flour Insp. v. Glover, 160 U.S. 170 (1895) 15
New York v. Ferber, 458 U.S. 747 (1982) 25
North Carolina v. Butler, 441 U.S. 369 (1979) 25
North Carolina v. Rice, 404 U.S. 244 (1971) 12
Northeast Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656 (1993) 15, 16, 17
Norwood v. Harrison, 413 U.S. 455 (1973) 23
Powell v. McCormack, 395 U.S. 486 (1969) 13
Preiser v. Newkirk, 422 U.S. 395 (1975) 13, 15, 17
Princeton Univ. v. Schmid, 455 U.S. 100 (1982) 16
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 22
Ragsdale v. Turnock, 841 F.2d 1358 (7th Cir.1988), *appeal dismissed*, 503 U.S. 916 (1992) 14
Rea v. Matteucci, 121 F.3d 483 (9th Cir. 1997) 28
Richards v. Jefferson County, 517 U.S. 793 (1996) 22
Roe v. Bryan, 728 P.2d 443 (Nev. 1986) 12
Roe v. Wade, 410 U.S. 113 (1973) 19
Shelton v. Lamb, 460 P.2d 156 (Nev. 1969) 23
Sosna v. Iowa, 419 U.S. 393 (1975) 19
Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911) 18, 19
Spencer v. Kemna, 523 U.S. 1 (1998) 13, 18, 19, 20
State v. Beck, 56 P. 1008 (1899) 28
Steffel v. Thompson, 415 U.S. 452 (1973) 12, 13
Storer v. Brown, 415 U.S. 724 (1974) 19
Taylor v. Beckham (No. 1), 178 U.S. 548 (1900) 26

Tilton v. Richardson, 403 U.S. 672 (1971) 23
United Parcel Service, Inc. v. Mitchell, 451 US 56 (1981) 22, 24
United States v. Alaska S.S. Co., 253 U.S. 113 (1920) 16
United States v. Concentrated Phosphate Exp. Ass'n., 393 U.S. 199 (1968) 14
United States v. SCRAP, 412 U.S. 669 (1973) 17
United States v. Van Winrow, 951 F.2d 1069 (9th Cir. 1991) 24
Vermont Agency of Natural Resources v. United States, 529 U.S. 765 (2001) 13
Wainwright v. Sykes, 433 U.S. 72 (1977) 24
Waller v. Georgia, 467 U.S. 39 (1984) 23
Walz v. Tax Comm'n, 397 U.S. 664 (1970) 23
Wardius v. Oregon, 412 U.S. 470 (1973) 25
Williams v. Eggleston, 170 U.S. 304 (1898) 25

Constitutional Provisions

U.S. Const. amend. XIV ..... *passim*
U.S. Const. Art. III, 2 12
Nevada Const. Art. 11, Sec. 6 ..... 2, 6, 9, 22
Nevada Const. Art. 4, Sec. 18 ..... *passim*
Nevada Const. Art. 9, Sec. 2 ..... *passim*

Statutes

28 U.S.C. § 1257 20

Rules

U.S. Supreme Court Rule 14.1(g)(i) 20, 22

Other Authorities

Associated Press, *Nevada Lawmakers Work on Tax Plan, Deadline Near, Reno Gazette-Journal*, Jun. 27, 2003 4
Dornan, Geoff, *Hope Dims for Tax Plan Passage, Nevada Appeal*, Jun. 29, 2003 4
Dornan, Geoff, *Shortfall mandates would hit university system hard*, Nevada Appeal, Aug. 16, 2002 3
Hagar, Ray & Tim Anderson, *Lawmakers Scramble to Pass Tax Package Before Deadline*, Reno Gazette-Journal, Jun. 1, 2003 3

Hagar, Ray, *Guinn asks for 3 percent cuts*, Reno Gazette-Journal, Aug. 15, 2002 3
Knight, Jennifer, *UNLV to cut classes to meet Guinn request*, Las Vegas Sun, Aug. 28, 2002 4
Marriott, Alexander, *Despite budget crisis, Nevada State Legislature vetoes new taxes*, Rebel Yell, Jul. 7, 2003.....4
Neff, Erin, *Alternative Business Tax in the Works*, Las Vegas Sun, May 20, 2003.....3
Neff, Erin, *Guinn Sets Friday Budget Deadline*, Las Vegas Sun, May 15, 2003 3
Riley, Brendan, *Governor: Nevada $275 million budget crisis 'worse by the day,'* Las Vegas Sun, Aug. 15, 2002.....3
Riley, Brendan, *Nevada Senate Leaves Assembly to Struggle with Tax Impasse*, Las Vegas Sun, Jun. 29, 2003 4
State of the State Address, Remarks by Governor Kenny C. Guinn to the 72nd Session of the Nevada Legislature, January 20, 2003 .....3, 4
Whaley, Sean, *State Budget Crisis: Conservatives: Cut budget, don't raise taxes; Programs can't be cut anymore, many others say*, Las Vegas Review-Journal, Jan. 12, 2003 4
Wiecek, William M., THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION (1972).....27
Wright, et al., FED. PRAC. & PROC. (2d ed. 1984).....14, 15

OPINIONS BELOW

The opinion of the Supreme Court of Nevada, dated July 10, 2003, is reported at 71 P.3d 1269 (Nev. 2003) and is reproduced at pages 1a-22a of the Appendix to the Petition for Certiorari. That Court's order denying Petitioners' motion for rehearing, dated September 17, 2003, is reported at 76 P.3d 22 (Nev. 2003) and is reproduced at 23a-50a. There are no opinions from the Nevada trial or intermediate appellate courts, as Respondent Governor Guinn brought his Petition for a Writ of Mandamus against the Nevada Legislature directly to the Nevada Supreme Court pursuant to that court's original jurisdiction.

PERTINENT CONSTITUTIONAL PROVISIONS

The Republican Guarantee Clause of Article IV, § 4 of the United States Constitution provides, in pertinent part:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

The Equal Protection Clause of the Fourteenth Amendment provides, in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article 4, §18(2) of the Nevada Constitution provides, in relevant part:

> [A]n affirmative vote of not fewer than two-thirds of the members elected to each house is necessary to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates.

Article 9, §2(1) of the Nevada Constitution provides:

> The legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year; and whenever the expenses of any year exceed the income, the legislature shall provide for levying a tax sufficient, with other sources of income, to pay the deficiency, as well as the estimated expenses of such ensuing year or two years.

Article 11, § 6 of the Nevada Constitution provides:

> In addition to other means provided for the support and maintenance of said university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law.

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

On July 1, 2003, the Governor of Nevada sued the Legislature of Nevada in the Supreme Court of Nevada, asking that sovereign court to construe and enforce eight provisions of the Constitution of Nevada. Petition for Writ of Mandamus (filed July 1, 2003), ¶¶1-7, at 2-3.

Most pertinently, the Governor petitioned the court below to construe—and to issue a writ of mandamus directing the Legislature to abide by—three key State Constitutional provisions: Article 11, section 6, which requires funding for the State's public schools and colleges ("the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund"); Article 9, section 2, which requires a balanced budget on an annual basis ("[t]he legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year"); and Article 4, section 18(2), which requires supermajority approval of any tax bill ("an affirmative vote of not fewer than two-thirds of the members elected to each House . . . to pass a bill . . . which creates, generates, or increases any public revenue in any form."). Pet. for Mandamus, ¶¶3-5, at 2-3.

The Governor's petition had been preceded by many months of political wrangling between the Governor and the Legislature, between the Legislature's Senate and Assembly, and between members within each House regarding whether, when, and how to fund the State's schools, balance the State's budget, and increase the State's taxes.[1]

Although the Legislature's leaders had hoped that the Legislature would be able to resolve the numerous issues related to the school budget and the general budget—and the taxes needed to pay for both—by the close of the Legislature's 72nd Regular Session,[2] it had been unable to do so,[3] which prompted the Governor to call two Special Sessions to try to complete that task. 7a. Moreover, although the Legislature had enacted taxes sufficient to balance the State's overall budget (excluding the education budget) and although it had approved a separate education budget, it was unable to agree on a tax bill needed to generate sufficient revenues to fund education at the level it had deemed necessary, falling one vote short of the required supermajority in one House. 6a-8a.

---

[1] *See, e.g., State of the State Address, Remarks by Governor Kenny C. Guinn to the 72nd Session of the Nevada Legislature, January 20, 2003;* Brendan Riley, *Governor: Nevada $275 million budget crisis 'worse by the day,'* Las Vegas Sun, Aug. 15, 2002, *available at* http://www.lasvegassun.com/sunbin/stories/text/2002/aug/15/081510482.html; Ray Hagar, *Guinn asks for 3 percent cuts,* Reno Gazette-Journal, Aug. 15, 2002, *available at* http://www.rgj.com/news/stories/html/2002/08/15/21693.php; Geoff Dornan, *Shortfall mandates would hit university system hard,* Nevada Appeal, Aug. 16, 2002, *available at* http://www.nevadaappeal.com/apps/pbcs.dll/article?Site=NA&Date=20020816&Category=NEWS&ArtNo=208160104&Ref=AR).

[2] Erin Neff, *Guinn Sets Friday Budget Deadline,* Las Vegas Sun, May 15, 2003, *available at* http://www.lasvegassun.com/sunbin/stories/text/2003/may/15/515086541.html; Erin Neff, *Alternative Business Tax in the Works,* Las Vegas Sun, May 20, 2003, *available at* http://www.lasvegassun.com/sunbin/stories/text/2003/may/20/515105673.html. *Cf.* Ray Hagar & Tim Anderson, *Lawmakers Scramble to Pass Tax Package Before Deadline,* Reno Gazette-Journal, Jun. 1, 2003.

[3] When the 72nd Regular Session of the State Legislature closed, $3.26 billion had been appropriated for various State functions. 7a. In accordance with Art. 9, §2's requirement that the budget be balanced, revenues were determined sufficient to meet that obligation. *Id.* Unfortunately, funding for education had not been approved. 7a-8a.

The leaders of both Houses saw the impasse as a temporary and relatively benign occurrence and expected to be able to resolve it in time for the opening of the upcoming school year. Nevertheless, despite their expectations and best efforts, when the Legislature did not resolve that impasse as quickly as the Governor deemed desirable, he declared an educational, constitutional, and fiscal crisis, and instantly branded the Legislature as the sole cause of the crisis. Memorandum in Support of Petition for Writ of Mandamus, at 10.

Thus, as grounds for his mandamus petition, the Governor asserted that the "Legislature's failure to adhere to its [State] constitutional duties imperil[ed] the State's educational system, place[d] the State on the brink of a fiscal crisis, and render[ed] the relevant portions of the Nevada Constitution meaningless." *Id.*

The Nevada Supreme Court, which was well-aware of the months-long political impasse – and the often red-hot rhetoric used by contending "public interest" lobbying groups[4] – and which had been alerted to the imminent filing of the Governor's petition,[5] entered a briefing order the same day that petition was filed. Order Directing Answer (filed July 1, 2003).

---

[4] *See, e.g., State of the State Address, Remarks by Governor Kenny C. Guinn to the 72nd Session of the Nevada Legislature, January 20, 2003;* Jennifer Knight, *UNLV to cut classes to meet Guinn request,* Las Vegas Sun, Aug. 28, 2002, *available at* http://www.lasvegassun.com/sunbin/stories/lv-ed/2002/aug/28/513911356.html; Sean Whaley, *State Budget Crisis: Conservatives: Cut budget, don't raise taxes; Programs can't be cut anymore, many others say,* Las Vegas Review-Journal, Jan. 12, 2003, *available at* http://www.reviewjournal.com/lvrj_home/2003/Jan-12-Sun-2003/news/20405972.html; Alexander Marriott, *Despite budget crisis, Nevada State Legislature vetoes new taxes,* Rebel Yell (UNLV student newspaper), Jul. 7, 2003, *available at* http://www.ryunlv.com/news/2003/07/07/Opinion/Despite.Budget.Crisis.Nevada.State.Legislature.Vetoes.New.Taxes-446417.shtml.

[5] Geoff Dornan, *Hope Dims for Tax Plan Passage, Nevada Appeal,* Jun. 29, 2003, *available at* http://www.nevadaappeal.com/apps/pbcs.dll/artikkel?SearchID=73163024723757&Avis=NA&Dato=20030629&Kategori=NEWS&Lopenr=306290102&Ref=AR; Brendan Riley, *Nevada Senate Leaves Assembly to Struggle with Tax Impasse,* Las Vegas Sun, Jun. 29, 2003, *available at* http://www.lasvegassun.com/sunbin/stories/text/2003/jun/29/062910619.html. *Cf.* Associated Press, *Nevada Lawmakers Work on Tax Plan, Deadline Near, Reno Gazette-Journal,* Jun. 27, 2003.

That Court's order noted "an apparent conflict" between the material state constitutional provisions, directed all parties to "address the dynamic tension created" by those provisions, and requested all parties to "identify and address all available means for resolving the impasse . . . ." *Id.*, at 3-4.

None of the briefs filed by the Governor, the Legislature, or various individual legislators—who collectively comprise the Petitioners and Respondents before this Court—raised any federal constitutional issues. Instead, their briefs focused exclusively on such factual questions as whether a budget crisis truly existed (and thus whether the case was ripe) and on such state constitutional questions as whether the Legislature and its members had violated sundry provisions of the state constitution, whether the individual legislators were immune from suit for putative violation of their official duties, whether the Governor's petition presented a non-justiciable political question, and whether that petition (and the State Supreme Court's entertainment and resolution of it) violated the State's separation of powers doctrine.

On July 10, the court below found that the Legislature, "faced with a rapidly increasing population" and "record-high needs," 9a, had not only "failed to fund education in the 72nd Regular Session and in two special sessions," but was "evidently in a deadlock over the means of raising the necessary revenues." 5a; *see* 13a-14a. According to that court, that "deadlock" had not merely "precipitated an imminent fiscal emergency" and "an unprecedented budget crisis," but also had the effect of threatening the State's longtime fiscal health as it "jeopardized" the "State's bond rating . . . ." 9a. Most immediately, the court opined that the deadlock had the potential of imperiling the education of the State's children as school "[t]eachers ha[d] not been hired," and "[e]ducational programs ha[d] been eliminated . . . ." *Id.*; *see* 13a-14a.

The court further determined that the Legislature "failed to fulfill its constitutional mandate" to balance the budget and provide funds for the schools "because of the conflict among several provisions of the Nevada Constitution," which the court, in its "judicial role as interpreter[] of the Nevada Constitution," felt an obligation to "reconcile." 5a-6a.

As the court explained:

> At the heart of this case is the two-thirds supermajority requirement for revenue-raising legislation. [Art. 4, §18(2)]. The Legislature is unable to fulfill its constitutional duties to fund the public schools [Art. 11, §6] and to adopt a balanced budget [Art. 9, §2] because it has not met the two-thirds vote requirement. The Legislature's failure to provide funds for public education, to pass the concomitant revenue generating package and to balance the state's budget after having had the opportunities of one general session and two special sessions to do so, [led] to the inevitable conclusion that it is futile to order the Legislature to debate further within the parameters of Article 4, Section 18(2). As constitutional construction is purely a province of the judiciary, [the court] undert[ook] to resolve the tension between the Legislature's constitutional obligation to fund public education and the constitutional provisions requiring a simple majority to enact appropriations bills but a two-thirds majority to generate or increase public revenue to fund those appropriations.

9a-10a (footnotes omitted).

The court noted that while it had no constitutional authority "to make appropriations, levy taxes, [or] balance the state's budget," it had the historic "province" and duty to "exercise its judicial function of interpreting the [State] Constitution" whenever "constitutional provisions are incompatible with one another or are unworkable, or when the enforcement of one prevents the fulfillment of another . . . ." 10a (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803)).

The court explained that in fulfilling its traditional duty as the interpreter and guarantor of the State Constitution, it had applied the ordinary tools of construction to the three provisions at issue in this case, 6a, and thus had studied their text and history in detail. 11a-14a. The court concluded that in

accordance with this long-established approach the venerable budget-balancing and school-funding requirements were "substantive and specific" and therefore were entitled to preference over the newer "procedural and general constitutional requirement of passing revenue measures by a two-thirds majority . . . ."6a. *See* 13a-14a.

The court added that its use of this standard approach to constitutional construction inexorably led to its ultimate conclusion: that the general and "procedural requirement must give way to the substantive and specific constitutional mandate to fund public education." *Id.* Consequently, the court granted the Governor's petition against the Legislature and directed "the Legislature . . . to proceed expeditiously with the 20th Special Session under simple majority rule." *Id.*

Three days after the lower court's decision, the Nevada Assembly amended and then approved Senate Bill 6 ("SB6"), a previously proposed tax bill, by a 26 to 16 vote, *i.e.*, less than a two-thirds margin, and then transmitted that bill to the Nevada Senate for reconsideration.[6]

The next day, the Nevada Senate, sitting as a committee of the whole, took up consideration of SB6 as it had been amended and approved by the Assembly; the Senate duly voted to reject rather than endorse the Assembly's amendments. As a result, and as discussed below, SB6 never became law.

Later that same day, 24 Nevada assemblymen and senators, including all of the Petitioners herein, filed a complaint in the

---

[6] Contrary to Petitioners' representations, even in the absence of the decision below, this action would not have violated the Nevada Constitution, because the Nevada Assembly could later have obtained a two-thirds vote on final passage of SB6. For example, since the Senate later refused to concur in the Assembly's amendments to SB6, and the Assembly refused to recede from its amendments, SB6 could have been referred to a conference committee. SB6 as amended by a conference committee would have been considered again by both houses and could have then been approved in both houses by a two-thirds vote. Thus, the final passage of SB6 would have been in compliance with the Nevada Constitution even in the absence of the decision below, and the earlier vote of 26 to 16 would not have been a final vote of final passage in contravention of the State's Constitution even in the absence of the decision below.

U.S. District Court for the District of Nevada, applying for and immediately obtaining an *ex parte* temporary restraining order prohibiting the Legislature from giving any effect to the Assembly's passage of amended SB6 until the matter could be heard by all of the District Court's active judges four days later. In the interim, the Governor and the Legislature filed briefs opposing the TRO.

On July 18, 2003, the District Court, sitting *en banc*, dissolved the TRO and dismissed the case in its entirety. The District Court plaintiffs immediately filed a Notice of Appeal with U.S. Court of Appeals for the Ninth Circuit, together with an emergency motion for a preliminary injunction pending appeal. The Ninth Circuit denied the emergency motion the same day; the appeal remains pending.

The decision of the District Court *en banc* to dissolve the TRO, combined with the Ninth Circuit's denial of the emergency motion, relegated the fate of SB6 back into the hands of the Nevada Senate, which, pursuant to the July 10 decision of the court below, had been directed to expeditiously approve such bills by a simple majority vote, rather than by a two-thirds margin. Before the Senate could do so, however, it needed to approve the Assembly's amendment to SB6. It rejected that option, however, and instead returned SB6 to the Assembly for the latter's reconsideration. The Assembly then voted not to recede from its amendments to SB6.

Pursuant to the Nevada legislature's standard operating procedures, neither of these actions – specifically, the Senate's decision not to concur in the Assembly's amendments to SB6, and the Assembly's decision not recede from those amendments – would have required a two-thirds vote by either House, even in the absence of the decision below. Significantly, neither House took any further action on SB6; it was not enrolled or enacted by the Legislature, and it was not transmitted to the Governor for his signature, and so never became law.[7]

---

[7] On July 20, the Assembly passed Senate Bill 5 ("SB5") by a 26 to 14 vote, *i.e.*, less than a two-thirds margin, and then transmitted that bill to the Senate. Contrary to Petitioners' representations, because SB5 simply

On July 21, 2003, the 24 members of the Nevada Legislature who had filed suit in the federal district court and who are the Petitioners herein, moved the court below to vacate its July 10 decision; they simultaneously petitioned that court for rehearing of that ruling and moved for an emergency motion for a stay of that ruling.

Finally, however, on the same day, a new tax bill, SB8, was introduced and passed in final form by both the Assembly and the Senate, this time by a two-thirds margin in each House.

On September 17, the Nevada Supreme Court denied the Petition for Rehearing, the motion to vacate, and the emergency motion for a stay, determining that the Legislature's July 21 enactment of SB8 – by the two-thirds margin called for by Art. 4, §18(2) – had mooted the case in its entirety. 46a.

REASONS FOR DENYING THE PETITION

The Petition for a Writ of Certiorari should be denied because this case is moot and non-justiciable. Petitioners sought to have any tax increase for educational purposes approved by a supermajority vote in both houses of the Nevada legislature; that has occurred, which leaves this Court with nothing to do but provide an advisory opinion on an abstract political question in a case with no actual, live controversy. Furthermore, contrary to Petitioners' contentions, neither the "capable-of-repetition, yet-escaping review" nor the "voluntary cessation" exceptions to the mootness doctrine fit the facts of this case.

As the court below held, 45a, the instant dispute was rendered moot when the State Legislature enacted a tax measure in accordance with the requirements of the three key provisions of the State Constitution at issue: the educational funding provision (Art. 11, §6), the balanced budget

---

amended SB6 and was not a distinct tax bill, and because SB5 did not have the effect of increasing the overall revenue to be raised by SB6, it did not require approval by a two-thirds vote, without regard to the decision below. Nevertheless, because the Assembly had amended this bill, too, it likewise could not become law without further concurring action by the Senate. The Senate did not, however, at any point thereafter ratify, concur, approve, or otherwise act on SB5, so it, too, was never enrolled, enacted, or transmitted to the Governor for his signature, and therefore never became law.

requirement (Art. 9, §2), and the supermajority requirement for tax measures (Art. 4, §18(2)). Petitioners speculate that the conflict that gave rise to the original dispute might reoccur someday and thus they are entitled to an advisory opinion from this Court on how the Nevada Legislature might best comply with the Nevada Constitution if a similar conflict should ever occur. This Court should refuse Petitioners' invitation to provide an abstract declaration of principles.

Even if this case were not moot, it still would not satisfy any of the traditional criteria for certiorari, as there is no conflict among the States or the U.S. Courts of Appeals, and as the Petitioners failed to timely raise—and the court below did not entertain or rule on—any of the federal questions they present in the Petition.

Of equal importance, the questions Petitioners now raise for the first time in this case are either inherently political and non-justiciable (the Republican Guarantee Clause question), an affront to Our Federalism (the question of whether a State Supreme Court's misinterpretation of the State's Constitution can violate the Fourteenth Amendment's Due Process Clause), or simply frivolous and unsupported by the record (the question of whether "voter dilution" can violate the Fourteenth Amendment's Due Process and Equal Protection Clauses in the absence of any evidence at all that Petitioners are members of a distinct and identifiable political group or that they were or will likely be the victims of intentional discrimination).

Lacking any adequate and legitimate grounds for gaining this Court's jurisdiction, Petitioners improperly ask this Court to grant certiorari not because of any conclusive actions taken or pending by the Nevada Governor or the Nevada Legislature, the principal Respondents herein, but rather in order to have this Court review and reverse an interpretation of the Nevada Constitution by the Nevada Supreme Court. In essence, Petitioners are asking this Court to assert supervisory control over that court because they are certain that the latter "ignore[ed] or misappl[ied] its own well-established canons of construction," Pet. at 11, in assessing the relative importance of what they denominate as a "key structural provision of the State Constitution," *id.*, at 10, in contrast to that court's decision

to accord higher priority to other provisions of the Nevada Constitution. *See id., at* 16-22; 11a-14a.

To reach Petitioners' issues, this Court must make two unprecedented, unjustified, and improper leaps of faith: *first*, that this Court has the authority to construe the Nevada Constitution and is, in fact, better able and better positioned to do so than the Nevada Supreme Court; and *second*, that the Nevada Legislature never would have enacted a tax increase by the necessary two-thirds vote if the Nevada Supreme Court had not ruled that a simple majority would satisfy State Constitutional requirements.

As to the first proposition, this Court's precedents unmistakably establish that state supreme courts are the final arbiters of their own state constitutions. As to the second, this Court has long said that it will not engage in the kind of academic exercises in rank speculation that Petitioners here seek.

From the earliest days, this Court has held that construction of a state constitution properly rests with the highest court of a state. Our Federalism counsels that this Court not abandon this settled jurisprudence. Under Petitioners' fanciful theory, however, this Court will become the court of last resort for any party disappointed with a state supreme court's interpretation of its own State Constitution. Such a theory is palpably at odds with our Nation's federalist design. Neither the Guarantee Clause nor the Fourteenth Amendment's Due Process and Equal Protection Clauses—which Petitioners contend should be read as creating a form of reverse incorporation of state constitutional provisions and thereby render them federal—provides this Court with jurisdiction over the Nevada Supreme Court's construction of its own state constitution.

I. THIS CASE IS MOOT

As the Nevada Supreme Court ruled, this case "became moot when the Legislature passed the revenue-generating bills by the requisite two-thirds vote." 45a. Although Nevada caselaw on mootness follows this Court's own jurisprudence,[8]

---

[8] *See, e.g., City of Reno v. Second Jud. Dist.*, 78 P.2d 101, 101 (Nev. 1998)("[n]o rule of law is better settled than that courts will not determine

this Court is not bound by that decision. Nevertheless, there are three reasons why this Court should reach the same conclusion and deny the instant Petition.

First, the purportedly "unconstitutional action," Pet. at 10—the "passage" of SB6 (a bill that would have increased taxes) by a simple majority vote in one House of the bicameral Nevada Legislature, *id.*—never ripened into law. In fact, that "action" was never enrolled or ratified by the Legislature as a whole, never transmitted to or signed by the Governor, never implemented, and never became law.

Second, there is no current, live controversy between the parties. Although the court below construed and reconciled conflicting provisions of the Nevada Constitution so as to authorize the Legislature to pass an educational tax bill for the 2003 legislative session by a simple majority vote, the Legislature never did so. Instead of passing a tax increase by an ostensibly unconstitutional simple majority vote, the Legislature enacted the tax increase incorporated in SB8 by an unquestionably constitutional two-thirds margin.

Finally, this Court cannot give any effectual relief to Petitioners. These reasons are discussed in detail below

As an initial matter, this Court has emphasized that the case-or-controversy requirement of Art. III, § 2 limits its jurisdiction to actual, "live" disputes between adverse parties, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000), *i.e.*, cases where the Court can "resolve 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character.'" *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)(citation omitted).[9] This means not only that "the plaintiff

---

moot or abstract questions," citing *California v. San Pablo & T.R. Co.*, 149 U.S. 308 (1893)); *Roe v. Bryan*, 728 P.2d 443, 444 (Nev. 1986)("Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief," citing *Steffel v. Thompson*, 415 U.S. 452, 458-59 (1973)); *Bd. of County Comm'rs, Clark County v. White*, 729 P.2d 1347, 1349 (Nev. 1986)(Nevada "has long adhered to the general rule that denies review to cases rendered moot by the happening of events subsequent to the initial controversy.").

[9] These "'requirement[s] subsist through all stages of federal judicial proceedings, trial and appellate,'" including on petitions for writs of certiorari. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)(citation omitted). *See also*

must have suffered, or be threatened with, an actual injury traceable to the defendant," *Spencer v. Kemna*, 523 U.S. 1, 7 (1998), but that there also must be a "'substantial likelihood' that the requested relief will remedy the alleged injury." *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 771 (2001)(citation omitted). *See Spencer*, 523 U.S., at 7.

Where, as here, these twin conditions have not been met, the case is moot and non-justiciable. Thus, this Court has held that it has no authority to answer recondite questions or "give opinions to abstract propositions," *Calderon v. Moore*, 518 U.S. 149, 150 (1996)(*per curiam*), quoting *Mills v. Green*, 159 U.S. 651, 653 (1895), to venture views on "'a hypothetical state of facts,'" *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)(citation omitted), to "declare principles or rules of law which cannot affect the matter in issue," *Mills, supra*, or "'to decide questions that cannot affect the rights of litigants.'" *Preiser*, 422 U.S., at 401. These principles are especially appropriate in this case, where Petitioners seek declaratory relief but where the underlying dispute lacks "'sufficient immediacy and reality to warrant the issuance of a declaratory judgment,'" *id.* at 402 (citation omitted), and where the decision below rests "on adequate and independent state grounds," which places nearly insurmountable "'limitations'" on the Court's jurisdiction. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)(citation omitted).

Evidently fearing that this Court might concur with the court below, 45a-46a, and thus conclude that their case is moot, Pet. at 27, Petitioners advance five reasons why it is not. Although two of those arguments invoke well-established exceptions to the mootness doctrine—"voluntary cessation" and "capable-of-repetition, yet-evading-review"—and accordingly will be addressed below, Petitioners' remaining, skeletal theories[10] have never been endorsed by this Court (or

---

Church of Scientology of Calif. v. Zolin, 506 U.S. 9, 12 (2002); *Calderon v. Moore*, 518 U.S. 149, 150 (1996)(*per curiam*); *Steffel v. Thompson*, 415 U.S. 452, 459, n.10 (1974); *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

[10] Petitioners conclusorily contend that this case is not moot because: "[f]irst," the decision below is a "'loaded weapon,'" and thus could be dangerous to someone, sometime in the future, Pet. at 26 (citation omitted); "[s]econd," the bill that was "passed" by a single House but never enacted

any other), and Petitioners advance no reasons why this Court should embrace them now.

A. The "Voluntary Cessation" Exception Does Not Apply

Petitioners concede that the Nevada Legislature has "voluntar[ily] ce[ased]" the "complained-of conduct," *i.e.*, it did not enact—and, in fact, never has enacted—a tax increase without the requisite supermajority vote. Pet. at 26. Petitioners nevertheless maintain that "however much the new" law, SB8, that was enacted by the Nevada Legislature by a two-thirds vote "'*may reduce the practical importance of this case*, it does not completely remove the controversy'" because the entire Legislature might "repeat [the mistake] in the future." *Id.* (emphasis added), citing *United States v. Concentrated Phosphate Exp. Ass'n.*, 393 U.S. 199, 203 (1968), and *Friends of the Earth, Inc. v. Laidlaw Env. Services (TOC), Inc.*, 528 U.S. 167, 189 (2000).

Petitioners' reliance on *Concentrated Phosphate* and *Friends of the Earth* is misplaced, though, as each case involved wrongful conduct by private parties. As courts and commentators have remarked, and as this Court's cases consistently demonstrate, "cessation of allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties." *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir.1988), *appeal dismissed*, 503 U.S. 916 (1992)(citing 13A, C. Wright, A. Miller & E. Cooper, FED. PRAC. & PROC. §3533.7, at 353 (2d ed. 1984)). Thus, while a skeptical posture might be "appropriate . . . for cases between private parties, . . . this is not the view we have taken toward acts of voluntary cessation by government officials. Rather, '[w]hen the defendants are public officials . . . we place greater stock in their acts of self-correction, so long as they appear genuine.'" *Fed'n of Adver. Indus. Rep's, Inc., v. City of Chicago*, 326 F.3d 924,

---

into law constitutes ostensibly historic "violat[ions]" of Petitioners' rights to Due Process, Equal Protection, and Republican Form of Government (albeit violations with no current consequences), *id.*; and "[f]inally," the refusal by the court below to vacate its previous decision interpreting and reconciling three State Constitutional provisions violated "its customary practice," which "thus causes ongoing harm," "exacerbates the due process problems," and "continue[s] to undermine a key structural limitation that the citizens of Nevada have imposed on their government." Pet. at 28.

929 (7th Cir. 2003)(citations omitted). "[S]uch self-correction provides a secure foundation for a dismissal based on mootness." *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990).

Indeed, as Profs. Wright, Miller, and Cooper have noted, "[c]ourts are more apt to trust public officials . . . to desist from future violations."[11] Justice O'Connor has explained why:

> [I]t is not at all reasonable to suppose that the legislature has repealed or amended a challenged law simply to avoid litigation and that it will reinstate the original legislation if given the opportunity. This is especially true where . . . the law has been replaced—no doubt at considerable effort and expense—with a more narrowly drawn version designed to cure alleged legal infirmities. *We ordinarily do not presume that legislative bodies act in bad faith.*

N.E. Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 677 (1993)(O'Connor, J., dissenting; emphasis added).

Not surprisingly, this Court has invariably held that challenges to assertedly unconstitutional statutes become moot whenever such statutes have expired or been repealed,[12] or,

---

[11] *See* 13A FED. PRAC. & PROC., *supra*, §3533.7 (2d ed. 1984 & 2003 Supp.), and *id.*, nn.9-11, citing *Preiser*, 422 U.S., at 402-403, *DeFunis v. Odegaard*, 416 U.S. 312 (1974), and *County of L.A. v. Davis*, 440 U.S. 625 (1979).

[12] *E.g., Heller v. Doe*, 509 U.S. 312, 333 n.4 (1993)(Due Process challenge "mooted by the repeal of the provision at issue")(citing *Dept. of Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986), and *Kremens v. Bartley*, 431 U.S. 119, 128-29 (1977)); *Burke v. Barnes*, 479 U.S. 361, 363-65 (1987)(challenge moot because statute had expired); *Bryan v. Austin*, 354 U.S. 933, 933 (1957)(*per curiam*)(challenge seeking declaratory and injunctive relief mooted by statutory repeal); *New Orleans Flour Insp. v. Glover*, 160 U.S. 170, 170 (1895) (repeal). *See also Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994)("As a general rule, if a challenged law is repealed or expires, the case becomes moot" unless "it is virtually certain that the repealed law will be reenacted"); *Am. Legion Post No. 7 v. City of Durham*, 239 F.3d 601, 606-07 (4th Cir. 2001); *Citizens for Resp. Gov't v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000); *D.H.L. Assoc. v. O'Gorman*, 199 F.3d 50, 55 (1st Cir. 1999); *Nat'l Black Police Ass'n v. Dist. of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997); *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir. 1997); *Associated General Contractors of Conn., Inc. v. City of New Haven*, 41 F.3d 62, 66 (2d Cir. 1994).

more analogously to this case, have been replaced by materially different statutes.[13] Thus, the "longstanding rule" is that if a "challenged statute no longer exists," or no longer exists in its original form, "there ordinarily can be no real controversy as to its continuing validity," *id., at* 670, with the result that "an order enjoining its enforcement would be meaningless." *Id.* "In such circumstances, it is well-settled that the case should be dismissed as moot." *Id.*

The exceptions to this line of cases and this "longstanding rule" are few and inapposite. Thus, a case is not moot where the record evidence establishes that the repeal of a challenged statute, the suspension of a challenged ordinance, or a moratorium on challenged regulation or practice is disingenuous, equivocal, and temporary,[14] or where a repealed

---

[13] *E.g., Lewis v. Continental Bank Corp.*, 494 U.S. 472, 474 (1990) (challenge rendered moot by amendment); *Massachusetts v. Oakes*, 491 U.S. 576, 582-84 (1989)(overbreadth challenge to criminal statute mooted by amendment that eliminated any possibility that it would either affect the defendant or could chill the rights of others); *Galioto, supra*, 477 U.S., at 559-60 (equal protection challenge mooted after amendment eliminated the allegedly discriminatory provisions); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (*per curiam*)("substantia[l] amend[ment]" of a challenged regulation completely mooted controversy over its validity); *Kremens, supra*, 431 U.S., at 128-30 (challenge to law permitting parents to commit juveniles under 18 to mental hospital mooted, with respect to those over 13, by new legislation permitting such commitment only of juveniles 13 and under); *Fusari v. Steinberg*, 419 U.S. 379 (1975)(Due Process challenge to unemployment compensation procedures mooted by amendment establishing additional procedural protections); *Allee v. Medrano*, 416 U.S. 802, 818-20 (1974)(where criminal statutes declared unconstitutional were replaced by "more narrowly drawn" versions, case was moot absent pending new prosecutions). *See also Diffenderfer v. Central Baptist Church of Miami, Inc.*, 404 U.S. 412, 414-15 (1972)(*per curiam*); *Bd. of Pub. Util. Comm'rs v. Compania General De Tabacos De Filipinas*, 249 U.S. 425, 426 (1919); *Berry v. Davis*, 242 U.S. 468, 470 (1917); *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920).

[14] *See, e.g., Hunt v. Cromartie*, 526 U.S. 541, 545 n.1 (1999)(challenge remained alive "[b]ecause the State's 1998 law provides that the State will revert to the [challenged] 1997 [law] upon a favorable decision of this Court"); *City of Los Angeles v. Lyons*, 461 U.S. 95, 99-102 (1983)(challenge to use of "chokeholds" was not mooted by city's moratorium on the practice, where city conceded that the moratorium was temporary, and warned that it might soon resume the practice); *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 n.11 (1982)(though city had repealed a challenged ordinance, this

ordinance or statute has already been replaced with one that has not been "sufficiently altered" from its predecessor. *Id.*, at 662 n.3. Although Petitioners cite an amicus brief to support their speculation, Pet. at 26, that if a budget crisis recurs in Nevada the entire Legislature will doubtlessly approve a tax increase by less than a two-thirds majority, this Court has never credited such conjecture as sufficient grounds for maintaining jurisdiction in an otherwise moot case.[15]

B. The "Capable-of-Repetition, Yet-Evading-Review" Exception Does Not Save this Case from Mootness

Petitioners contend that even if the "voluntary cessation" exception does not save their case from mootness, Pet. at 28, sundry "facts"—*e.g.*, that *(1)* a budget crisis might recur in Nevada, sooner or later; *(2)* such a crisis could cause the State's schools not to be funded; *(3)* a simple majority of both Houses of the Nevada Legislature might decide to levy higher taxes to cure a general budget crisis and a particular school funding

---

Court declined to find the case moot because city had announced it would reenact the ordinance if the case was dismissed). *See also id.*, 455 U.S., at 296, n.* (White, J., concurring and dissenting in part); *Bell v. Wolfish*, 441 U.S. 520, 542 n.25 (1979); *Maher v. Roe*, 432 U.S. 464, 468 n.4 (1977).

[15] *See Preiser, supra*, 422 U.S., at 403 ("remote and speculative" consequences insufficient to defeat mootness); *United States v. SCRAP*, 412 U.S. 669, 688-89 (1973)("pleadings must be something more than an ingenious academic exercise in the conceivable."); *Hall v. Beals*, 396 U.S. 45, 49 (1969)("speculative contingencies afford no basis for our passing on the substantive issues [Petitioners] would have us decide . . ."); *Bd. of License Com'rs of Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985)(same). *See also Fed'n of Adver. Indus. Rep's, supra*, 326 F.3d, at 930 ("Rather than presuming bad faith, we have repeatedly held that the complete repeal of a challenged law renders a case moot, unless there is [record] evidence creating a reasonable expectation that the City will reenact the ordinance or one substantially similar."); *Nat'l Black Police Assoc., supra*, 108 F.3d, at 349 ("[T]he mere power to reenact a challenged law is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists. Rather, there must be evidence indicating that the challenged law likely will be reenacted."); *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir. 1997)(amendment mooted challenge where the state had expressed no intention to reenact the prior law); *Jones v. Temmer*, 57 F.3d 921, 923 (10th Cir. 1995)("[D]efendants' assert[ion] that the claims are not moot because the . . . legislature remains free to reinstate the old law" is too conjectural and speculative to avoid a finding of mootness").

crisis; and *(4)* at least one House might not pass such taxes by a two-thirds margin—collectively "*demonstrate* that the case is capable-of-repetition, yet-evading-review, an exception to the mootness bar." Pet. at 28 (emphasis added)(citing *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)).

The "capable-of-repetition" exception does not apply here, inasmuch as Petitioners have both misread the cases elucidating this doctrine and failed to show that the qualifying "facts" in this case are truly as they portray them to be.

As this Court recently stressed, a party seeking to take advantage of the capable-of-repetition exception must do much more than merely claim, or even clearly prove, that allegedly wrongful conduct will recur.

> [T]he capable-of-repetition *doctrine applies only in exceptional situations*, where the following *two circumstances are simultaneously present*: (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, *and* (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.

Spencer, supra, 523 U.S. at 17-18 (emphases added; internal brackets, quotation marks, and citations omitted).

Petitioners satisfy neither of these conditions, let alone both. *First*, they have not introduced any evidence demonstrating the "reasonable likelihood" that the same putative misconduct will recur and that they will be the victims of such misconduct. Instead, they merely allege that it is possible, ascribing improper motive to a legislative body that this Court will not presume is harbored. Nor have they shown that that the same legislators are reasonably likely to hold office at the next opportunity to develop a budget, to oppose any tax measure calculated to balance an approved budget, and to constitute part of a greater than one-third minority.

Second, even assuming, *arguendo*, that the dominoes would fall on Petitioners exactly as they predict, they have not asserted—much less demonstrated—*any* likelihood that a new budget-funding-tax crisis would be "too short" in "duration . . .

to be fully litigated prior to cessation or expiration." *Id.* In fact, Nevada law maximizes the chances for timely review.[16]

Finally, this case is unlike ones challenging electoral practices, "which are quintessential examples of repeated disputes of such short duration that they are 'capable-of-repetition, yet-evading-review.'" *Id.* at 18 (citation omitted).[17] Most tellingly, this case is unlike *Southern Pacific* itself, the 1911 case that inaugurated the exception, and a case that Petitioners cite but do not describe. Unlike *Southern Pacific,* the conduct that Petitioners assail here does not involve a "*short term [administrative] order[],*" which was "virtually impossible to litigate the validity of . . . prior to its expiration." 219 U.S. at 515. Because of that fact, "and the additional fact that the same party would in all probability be subject to the same kind of order in the future, review was allowed even though the order in question had expired by its own terms." *Id.*

---

[16] The procedural safeguards incorporated in the Nevada Constitution include, Art., 4, §18(1), which minimizes the possibility of stealthy legislation by requiring that "[e]very bill . . . must be read by sections on three several days, in each House unless in case of emergency. The reading of a bill by sections, on its final passage, shall in no case be dispensed with, and the vote on the final passage of every bill or joint resolution shall be taken by yeas and nays to be entered on the journals of each House." The Nevada courts have been able to provide security to forestall the implementation of suspect legislation before timely judicial review. *See, e.g., Binegar v. Eighth Judicial Dist.,* 915 P.2d 889, 892 (Nev. 1996)("*in almost every case challenging the constitutionality of [a criminal statute] the defendant will request this court to stay* the application of the statute to his or her case pending an opinion by this court determining whether the statute is constitutional *[and] this court will grant the stay.*"); *Boyne v. State ex rel. Dickerson,* 390 P.2d 225 (Nev. 1964).

[17] *See, e.g., Morse v. Repub. Party of Virginia,* 517 U.S. 186, 235 n.48 (1996) ; *Anderson v. Celebrezze,* 460 U.S. 780, 784 n.3 (1983) ; *Storer v. Brown,* 415 U.S. 724, 737 (1974); *Moore v. Ogilvie,* 394 U.S. 814, 816 (1969). *Cf. Dunn v. Blumstein,* 405 U.S. 330, 333 n.2 (1972).

Nor is this case anything like the two other classic examples of the exception: *Sosna v. Iowa,* 419 U.S. 393, 400 (1975)(challenge to short-term state residency requirement for divorces was not moot because the barriers to potential divorcees were "capable-of-repetition, yet-evading-review"); and *Roe v. Wade,* 410 U.S. 113, 125 (1973)(finding "human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete," so that "pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied.").

In sum, Petitioners have not shown this case to be anything like one of "exceptional situations" which are capable of both being repeated and evading review, *Spencer*, 523 U.S. at 17, and they have not demonstrated how this case satisfies *Spencer*'s dual and "simultaneous" requirements. *Id.*

II. THIS COURT LACKS JURISDICTION OVER THIS CASE BECAUSE THE QUESTIONS PRESENTED WERE NOT RAISED OR DECIDED BELOW

This Court's Rule 14.1(g)(i) mandates, in pertinent part, that "[i]f review of a state-court judgment is sought" on a petition for certiorari, the petition "shall contain":

> specification of the stage in the proceedings . . . when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Petitioners have not complied with this command.

The reasons why Petitioners have defaulted on this requirement are self-evident. *First*, the court below did not "pass on" the federal questions presented in the Petition, either in its initial opinion of July 10, 2003, or its subsequent opinion of September 17 rejecting Petitioners' demand for rehearing. *Second*, Petitioners never raised these questions in a "timely and proper[]" manner in their initial brief to the court below; rather, they raised them tardily and improperly in their petition for rehearing from the July 10 decision.

These flaws are fatal. With extremely few exceptions, this Court has "adhered to the rule in reviewing state court judgments under 28 U.S.C. §1257" that it will "not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the

decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997)(*per curiam*)(citations omitted).[18]

Petitioners concede by their silence that the court below did not reach any of the three questions on which they now seek certiorari. Nor have Petitioners met their burden of showing that these questions were properly presented to that court. Where, as here, a state's highest court is silent on the federal questions presented in a petition for certiorari, this Court invariably "assume[s] that the issue[s] w[ere] not properly presented," *id.* (citation omitted), with the result that "the aggrieved party bears the burden of defeating this assumption, by demonstrating that the state court had 'a fair opportunity to address the federal question[s] that [are] sought to be presented here.'" *Id.* at 87.

Although this Court has identified at least three ways in which a petitioner can satisfy this requirement, *id.*, Petitioners have failed to take advantage of any of them. In short, Petitioners have done nothing to meet their "burden" under *Adams* and have done nothing to demonstrate that they complied with the applicable state rules for raising their federal constitutional claims before the court below. Nor have they explained why their failure to comply with those rules was not an adequate and independent ground for the court below to disregard that claim. *Id.*

Petitioners may argue that they should be excused for failing to raise below the issues they have now put before this

---

[18] *E.g., Campbell v. Louisiana*, 523 U.S. 392, 403 (1998); *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-19 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, [illegible] (1940). This rule also serves the interests of comity, as "'it would be unseem[illegible] our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams*, 520 U.S., at90 (citations omitted). As in *Adams*, the court below "has an undeniable interest in having the opportunity to determine in the *first* instance whether its construction of the [state] [c]onstitution comports with the federal constitution." *See id.* This Court's traditional deference to a state highest court on such matters "also reflects 'practical considerations' relating to this Court's capacity to decide issues," as "[r]equiring parties to raise issues below not only avoids unnecessary adjudication in this Court," but also promotes "the creation of an adequate factual and legal record." *Id., at* 90-91.

Court because Due Process and Equal Protection claims were timely raised in an *amicus* brief filed in the court below by the Nevada State Education Association (NSEA). This argument is unavailing because the court below, like this Court, is not required to and almost always refuses to consider issues not raised by a party.[19] And, indeed, the court below did not rule on any of the federal constitutional issues raised by the NSEA.

Petitioners may claim, in the alternative, that they should be relieved from Rule 14.1(g)(i)'s strictures because they were caught unawares by the lower court's initial ruling and, accordingly, their petition for rehearing provided the first reasonable opportunity for these issues to be raised by anyone. This Court should rebuff this excuse as well.

To be sure, in the last seventy years this Court has granted certiorari in two cases arising from state supreme courts even though the federal questions were not raised in those courts until rehearing. In *Richards v. Jefferson County*, 517 U.S. 793, 797 n.3 (1996), and *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 n.9 (1980), this Court bent its usual rule because the lower court's initial ruling in each case was not only novel but could not reasonably have been anticipated and addressed in an earlier filing. Although Petitioners may assert that they fit within the *PruneYard-Richards* exception, because they, too, were totally surprised, that claim is not legally supportable.

First, the lower court's initial briefing Order of July 1 not only drew attention to "an apparent conflict" between the provisions of the State Constitution mandating *(a)* funding of the public schools, Art. 11, §6, *(b)* a balanced budget for the State overall, Art. 9, § 2, and *(c)* a two-thirds majority vote in both Houses of the Legislature for any tax increases to defray the costs of *(a)* and *(b)*, Art. 4, §18; that Order also specifically directed all interested parties to "address the dynamic tension created" by the different constitutional provisions and to

---

[19] *See, e.g., Nevada Power Co. v. Haggerty*, 989 P.2d 870, 877 n.9 (Nev. 1999); *United Parcel Service, Inc. v. Mitchell*, 451 US 56, 60 n.2 (1981); *Bell v. Wolfish*, 441 U.S. 520, 532 n.13 (1979); *Knetsch v. United States*, 364 U.S. 361, 370 (1960). This principle is especially honored in cases of first impression involving the interpretation of a statute or a constitutional provision. *Davis v. United States*, 512 U.S. 452, 457 n.3 (1994)(*per curiam*).

"identify and address all available means for resolving the impasse . . . ." Order Directing Answer (filed July 1, 2003), at 3. That Order should have alerted Petitioners that the lower court might again do what it – and this Court – have not infrequently done: reduce such "tension" in a particular case by giving primacy to one constitutional provision over another.[20]

Second, even if Petitioners missed the import of the lower court's command to "address the dynamic tension" that court had identified, other interested entities did not. Indeed, as noted above, the NSEA, whose *amicus* brief to the lower court was timely filed, and whose brief Petitioners studied with considerable care, *see, e.g.*, 56a, n.9, raised two of the principal federal constitutional issues that Petitioners present in their instant petition to this Court: asserting that "voter dilution" violated the Fourteenth Amendment's Due Process and Equal Protection Clauses.[21] Thus, although Petitioners may say that the federal issues that they have raised here, and which they

---

[20] *See, e.g., Bowyer v. Taack*, 817 P.2d 1176, 1177 (Nev. 1991); *Shelton v. Lamb*, 460 P.2d 156, 157 (Nev. 1969); *Ex rel Shelor*, 111 P. 291, 293 (Nev. 1910); *Tilton v. Richardson*, 403 U.S. 672, 677 (1971)(reconciling First Amendment's Free Exercise and Establishment Clauses); *Norwood v. Harrison*, 413 U.S. 455, 469 (1973)(same); *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)(same); *Nebr. Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976)(reconciling First Amendment's Free Press Clause with Sixth Amendment's Fair Trial Clause); *Waller v. Georgia*, 467 U.S. 39, 45 (1984)(same).

[21] Significantly, although no other brief duplicated the NSEA's arguments, or the breadth of its scholarship on these and related federal constitutional issues, *see Amicus* Brief of the NSEA (filed July 7, 2003), at 3-5, 9-18, nearly every party and *amicus* – with the exception of Petitioners – appreciated the importance of federal constitutional provisions (and this Court's caselaw regarding those provisions), and so liberally larded their briefs with citations to same. *See, e.g.,* Answer and Opposition to Petition for Writ of Mandamus (filed July 3, 2003, by Care and Amodei), at 11; Answer and Opposition to Petition for Writ of Mandamus (filed July 7, 2003, by Respondent Nevada State Legislature), at 7, 9-11, 13, 22-23, 25, 28-29, 38, 40, 46-47, 49; *Amicus* Brief of Pacific Legal Foundation (filed July 7, 2003), at 2-3, 10-13, 15; *Amicus* Brief of the University of Nevada (filed July 7, 2003), at 2; *Amicus* Brief of the Clark County Ass'n of School Administrators (filed July 7, 2003), at 12-13; Supp. Brief of Petitioner Gov. Kenny C. Guinn (filed July 7, 2003), at 4, 7; Supp. Brief in Opposition to Governor's Petition and Counter-Petition for a Writ of Mandamus (filed July 7, 2003), at 5, 11, 13; *Amicus* Brief of Nevada Taxpayers Ass'n (filed July 7, 2003), at 2, 7, 15-16, 18.

first raised in their petition for rehearing, could not have been anticipated or addressed before the lower court's initial ruling, the NSEA brief belies that assertion.

Finally, although, as also noted above, the lower court was not obliged to entertain issues raised by *amici,* Petitioners could have adopted the NSEA's issues and arguments as their own. *See, e.g., United Parcel Serv., Inc. v. Mitchell,* 451 U.S. 56, 60 n.2 (1981); *United States v. Van Winrow,* 951 F.2d 1069, 1072 (9th Cir. 1991)(*per curiam*). Indeed, while Petitioners' counsel received a negative response from the lower court to their query as to whether it would "order" "a response" to the NSEA brief, counsel never inquired whether the lower court would *allow* either such a response or a second supplemental brief. 56a, n.9.

In sum, Petitioners rejected the lower court's invitation to raise whatever issues they thought appropriate, neglected to respond to the NSEA's filing, and failed to take advantage of an opportunity to timely adopt and present as their own the federal constitutional issues raised by the NSEA.

This Court has held that regardless of whether a critical omission, such as the failure to raise federal issues in the underlying proceedings, is the product of inexcusable ignorance or neglect or results from a deliberate decision to withhold credible arguments in order to gamble on winning outright while silently reserving a dispositive claim or hypothetically cert-worthy issue, *Engle v. Isaac,* 456 U.S. 107, 129 & n.34 (1982), Petitioners are not permitted to profit such tactics or from their counsel's mistakes. *See Granberry v. Greer,* 481 U.S. 129, 131-32 (1987); *Wainwright v. Sykes,* 433 U.S. 72, 89-90 (1977). In the final analysis, Petitioners' failures undercut any claim of shock and surprise and defeat any attempt to have this Court grant their petition.

III. PETITIONERS' CLAIMS LACK MERIT AND RAISE A NON-JUSTICIABLE POLITICAL QUESTION

Even assuming, *arguendo,* that neither mootness nor Petitioners' failure to raise below the federal questions they now present bar this Court from assuming jurisdiction, Petitioners' arguments on those questions lack merit.

A. Petitioners' Republican Guarantee Clause Claim Presents a Non-Justiciable Political Question

Under Petitioners' theory, any alleged or purported error in constitutional construction of a state constitution by a state court of last resort violates the Republican Guarantee Clause and renders that court's decision eligible for review and reversal by this Court. Pet. at 11-14. Accepting that theory would not only open the floodgates to every litigant disappointed by the result of a state constitutional law decision, it would change fundamental premises that this Court has held sacred for more than 200 years, that "this court has no jurisdiction to determine that any law of any state Legislature, contrary to the Constitution of such state, is void," that State courts "are the proper tribunals to decide, whether laws, contrary to the constitution thereof, are void," and that state courts are the final arbiter of their own laws and constitutions. *Calder v. Bull*, 3 U.S. (Dall.) 386, 392-93 (1798)(per Chase, J.). Resultantly, "[a] judgment by the highest Court of a state as to the meaning and effect of its own constitution is decisive and controlling everywhere." *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 613 (1937)(Cardozo, J.).[22]

---

[22] *See also Nesmith v. Sheldon*, 48 U.S. 812, 818 (1849)("it is the established doctrine of this court, that it will adopt and follow the decisions of the State courts in the construction of their own constitution . . . , when that construction has been settled by the decision of its highest judicial tribunal."); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 155 (1896)("there is no justification for the federal courts to run counter to the decisions of the highest state courts upon questions involving the construction of state statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law."); *Williams v. Eggleston*, 170 U.S. 304, 310 (1898) (" this court cannot hold that the state court was mistaken in its construction of the state constitution"); *North Carolina v. Butler*, 441 U.S. 369, 376 n.7 (1979)("this Court must accept whatever construction of a state constitution is placed upon it by the highest court of the State.") *Cf. Johnson v.* Frankel, 520 U.S. 911, 916 (1997); *Arizona v. Evans*, 514 U.S. 1, 9 (1995); *New York v. Ferber*, 458 U.S. 747, 767 (1982); *Exxon Corp. v. Dept. of Revenue of Wis.*, 447 U.S. 207, 226 n. 9 (1980); *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967). "This proposition, fundamental to our system of federalism, is applicable to procedural" constitutional "rules as well as substantive rules." *Johnson*, 520 U.S., at 516, citing *Wardius v. Oregon*, 412 U.S. 470, 477 (1973).

In fact, this Court has repeatedly recognized that "'it is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.'" *Michigan v. Long, supra,* 463 U.S., at 1040, quoting *Minnesota v. National Tea Co.,* 309 U.S. 551, 557 (1940). Any other view, particularly the one advanced by Petitioners here, would require this Court to undertake supervisory control over a state supreme court anytime such a court frustrates a litigant by construing its own constitution in a fashion contrary to one that this Court might prefer if standing in the state court's shoes.

Petitioners' proposal has alarming implications. Transforming this Court into a court of error to review alleged misinterpretations of state constitutions would not only threaten to overwhelm this Court's docket, but inevitably would upset the fundamental balance put in motion when the Federal Constitution was promulgated. This Court has consistently adhered to a respect for the independence and authority of state courts, and has left undisturbed decisions that might otherwise be viewed as unwise or even extreme. For these reasons, this Court has consistently rejected entreaties to use the Guarantee Clause as a fulcrum to pry away authority from state courts or state political systems. [23]

This Court has emphasized that a dominant consideration in assessing whether an issue is justiciable (or inherently political and non-justiciable) is whether there are "satisfactory criteria for a judicial determination." *Coleman v. Miller,* 307 U.S. 433, 454-55 (1937). Thus, in *Baker v. Carr,* this Court examined the Guarantee Clause in detail and concluded that the lack of standards to guide judicial discretion rendered decisions on claims under the Clause as involving "those elements which define a 'political question,' and for that reason and no other, they are non-justiciable." 369 U.S. 186, 218 (1962). Similarly

---

[23] *See, e.g., Taylor v. Beckham (No. 1),* 178 U.S. 548 (1900)(Guarantee Clause claim that Kentucky's resolution of contested gubernatorial election deprived voters of republican government held non-justiciable); *Luther v. Borden,* 48 U.S. (7 How.) 1 (1849)(Guarantee Clause claim that popular assembly's proclamation of new government nullified martial law decree of charter government held non-justiciable; this Court refused to decide which one of the two existing governments was legitimate).

here, there are no standards to guide this Court, as this Court has never developed any such standards and as Petitioners have not suggested any of their own. Any dispute that may reoccur properly belongs in the political system.

The appropriateness of a political resolution of this controversy, as opposed to a judicial one, becomes even clearer when one examines Petitioners' other claims. The authority that Petitioners would have this Court exercise—ultimate interpretational control over a State Constitution and mandatory review of "voter dilution" claims whenever legislative procedural devices might limit legislators' participation in ultimate decisions—would constitute an unnecessary and improper interference with the business of state legislatures and the rulings of their parliamentary officers.

In addition, because Petitioners' claims sound in Equal Protection and Due Process, any endorsement by this Court of those process-based claims would readily lead to petitions to have this Court oversee the internal affairs of Congress, as the partisan contentiousness in that body often results in procedural gambits that benefit one or another side in a dispute. Unless this Court wishes to become continually ensnarled in that never-ending political thicket, it should not abandon its traditional view that these issues are properly and exclusively committed to political resolution.[24]

Indeed, any other result would be a significant expansion of this Court's jurisdiction and would constitute an unlimited license to interfere with the sovereignty of the States. There is no reason for this Court to begin down a road so clearly and so wisely rejected by the Framers of our Constitution. For these reasons, intervention by this Court is as unwise as it is unwarranted.

---

[24] Historically, Guarantee Clause issues were enforced at the federal level by congressional action. For example, when States of the Confederacy were readmitted into the Union following the Civil War, all questions regarding the compliance of their constitutions with Guarantee Clause considerations fell to and were resolved by Congress, and by Congress alone. *See generally,* William M. Wiecek, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 11-77 (1972). Petitioners have provided no reason for this Court to depart from that historic approach.

B. Petitioners' Due Process Claims Are Hollow

Petitioners assert that the Fourteenth Amendment's Due Process and Equal Protection Clauses are violated whenever a state's highest court allegedly strays from its own canons of constitutional interpretation or when a state legislature supposedly departs from its own procedures. Pet. at 16-22, citing *Conway v. Searles*, 954 F. Supp. 756 (D. Vt. 1997), and *Rea v. Matteucci*, 121 F.3d 483 (9th Cir. 1997). Petitioners make too much of those cases, however, as in each one the state legislature had enacted laws that affected vested property rights of the plaintiffs, yielding claims quite different than the ones asserted here.

In fact, the broad proposition asserted by Petitioners would mean that the Fourteenth Amendment's Due Process and Equal Protection guarantees operate to invalidate the well-established "enrolled bill rule," under which an act passed by a legislature, executed by the proper legislative officers, signed by a governor, and filed in the appropriate office not only constitutes conclusive evidence of the passage of the act as enrolled but also immunizes that act from attack on the basis of imagined or even real procedural irregularities.

The "enrolled bill rule" has been a longtime feature of both this Court's jurisprudence, *see, e.g., Field v. Clark*, 143 U.S. 649 (1892), and Nevada caselaw. *See, e.g., State v. Beck*, 56 P. 1008, 1010 (1899). Significantly, neither this Court nor any other has recognized or even suggested federal constitutional limitations on the "enrolled bill rule" like those proposed by Petitioners.

The reason why no court has imposed such limitations lies in the widespread appreciation that that rule reflects constitutional understandings rooted in the separation of powers, as well as the importance of allowing the legislature to police its own processes without undue intrusions by other branches. *See, e.g., Greenberg v. Bolger*, 497 F. Supp. 756, 773 (E.D.N.Y. 1980). A departure from the rule would also create a new exception to this Court's holding that "the legislative determination provides all the process that is due." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982).

Due Process claims remain available, of course, when the legislative action is "wholly arbitrary or irrational." *Id., at* 433. But that type of arbitrariness or irrationality is not, however, the gravamen of Petitioners' complaint. Instead, Petitioners speculate about a future injury in a future case, one in which their votes might be accorded less than a heightened or enlarged impact (greater than a "one person, one vote" effect), and thus argue that this could conceivably constitute the type of intentional discrimination that actual voter dilution claims must prove. Their argument requires conjectures to be pyramided upon suppositions, without the necessary specific proofs. This Court should not countenance it.

C. Petitioners' Voter Dilution Claims Are Unsupported by Anything in the Record of this Case

Petitioners' voter dilution claims are equally lacking in merit. To meet the requirements of a voter dilution claim under the Fourteenth Amendment, Petitioners were required "to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Davis v. Bandemer*, 478 U.S. 109, 127 (1986). Petitioners offered no such proof on either prong of the *Davis* test.

First, Petitioners have not and cannot show that they are members of an "identifiable political group." Although 23 of the 24 Petitioners voted against all of the tax bills at issue in this case, there is nothing in Petitioners' composition or status as a "group" that indicates that they are committed to voting as a bloc against all taxes or that they will be in a position, as elected representatives, to do so in the future. (While all of the Petitioners are Republicans, so are more than half the members of the Nevada Legislature, as are a third of the Respondents, including both the Governor and Lieutenant Governor).

Second, Petitioners have not and cannot demonstrate that the Nevada Supreme Court's ruling that would have permitted approval of a tax bill by a simple majority vote in both houses was motivated by an intent to discriminate or that Nevada's elected officials (including the members of that court, the leaders of the Legislature, or the Governor and Lieutenant Governor) intend to discriminate against them in the future.

Moreover, merely pointing to a disagreeable result, which is all Petitioners have done, is no evidence of improper motive.[25]

Finally, Petitioners' reliance on *Coleman v. Miller*, 307 U.S. 433 (1939), to support their voter dilution claims is misplaced. In *Coleman*, state legislators opposed to a proposed federal constitutional amendment challenged the right of the lieutenant governor to cast the decisive ratifying vote. This Court found that it had jurisdiction solely because the federal amendment process was at issue. Because the state legislative action was part of a federal constitutional process and not solely internal to the state, that legislative action was within this Court's cognizance. Indeed, the *Coleman* Court provided a blueprint as to why the Court should not entertain this matter: "*Had the questions been solely state questions, the matter would have ended there.* But the questions raised in the instant case arose under the Federal Constitution and these questions were entertained and decided by the state court." *Id.*, at 437-38 (emphasis added; citations omitted).

Here, however, the questions "arose under" the Nevada Constitution, not the Federal Constitution, and were not raised before, entertained by, or ruled on by the court below. There is no province to do so now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

---

[25] This Court has recognized that no presumption of intentional discrimination can attach to the actions of elected officials (both legislators and supreme court justices are elected officials in Nevada). *See Davis, supra,* 478 U.S., at132 ("without specific supporting evidence, a court cannot presume in such a case that those who are elected will disregard the disproportionately underrepresented group.").

NED MILTENBERG
Counsel of Record
ROBERT S. PECK
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
1050 31st Street, N.W.
Washington, D.C. 20007
(202) 944-2840

BRENDA J. ERDOES
SCOTT G. WASSERMAN
WILLIAM L. KEANE
LEGISLATIVE COUNSEL BUREAU
NEVADA STATE LEGISLATURE
401 S. Carson Street
Carson City, NV 89701
(775) 684-6620

ERWIN CHEMERINSKY
THE LAW SCHOOL
UNIVERSITY OF SOUTHERN CALIFORNIA
699 Exposition Blvd.
Los Angeles, CA 90089
(213) 740-2539

February 20, 2004

Counsel for all Respondents Except Hon. Kenny Guinn, Governor, and Hon. Lorraine T. Hunt, Lieutenant Governor, State of Nevada